

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Minutes of Teleconference  
November 18, 2005**

**Members Participating**

Mark I. Harrison, Chair  
Loretta C. Argrett  
Jan W. Baran  
Hon. Cara Lee T. Neville  
Hon. James A. Wynn  
Hon. Harriet Turney

**Staff Participating**

Jeanne P. Gray, CPR Director  
George A. Kuhlman, Ethics Counsel  
Eileen B. Libby, Associate Ethics Counsel  
Marcia Kladder, CPR Program Director  
Nancy Slonim, Media Relations

**Reporters Participating**

Charles G. Geyh  
W. William Hodes

**Advisors Participating**

Hon. Carol B. Amon  
Robert P. Cummins  
Hon. Peter W. Bowie  
Marvin L. Karp  
D. Dudley Oldham  
Hon. Ellen F. Rosenblum  
Seth Rosner  
Robert Tembeckjian

[Cynthia Gray of The American Judicature Society (“AJS”) participated in the discussion.]

The Joint Commission reviewed the November 10, “Final Canon 5 Concordance,” consisting of proposed Canon 5 provisions containing references to public and Joint Commission member and advisor comments. There were no objections to changing Canon 5’s title to “A Judge or Candidate for Judicial Office Shall Not Engage in Political and Campaign Activity that is Inconsistent with the Independence, Integrity, and Impartiality of the Judiciary.” Proposed Rule 5.01 will be captioned, “Restrictions on Political and Campaign Activities of Judges and Candidates for Judicial Office.”

The Joint Commission decided to return to current Code language regarding judges attending events sponsored by a political organization and purchasing tickets for dinners or other events sponsored by a political organization or a candidate for public office. There will be a new definition of “campaign contribution” in the Terminology section.

Regarding proposed Rule 5.01(A) (11), the Joint Commission rejected a suggestion to prohibit all comments, not just those affecting the outcome of a case. The revised provision will read “make any comment that might reasonably be expected to affect the outcome or impair the fairness of a matter while it is pending or impending in any court.”

Proposed Rule 5.01(B)(1) will state, “[a] candidate for judicial office shall take reasonable measures to ensure that other persons do not do on behalf of the candidate what the candidate is prohibited from doing by this Code, whether or not the other person is under the direction and control of the candidate.”

The Joint Commission adopted a new proposed Rule 5.01(B)(4), which will state, “review and approve the content of all campaign statements and materials prior to dissemination by the candidate or the candidate’s committee.” By a close vote, they decided to add as proposed rule 5.01(C) “[a] judge or a candidate for judicial office may engage in political activity on behalf of measures to improve the legal system or the administration of justice.”

The provision regarding “use court staff, facilities, or other court resources in a campaign for judicial office” will be moved to the black letter rules.

Turning to proposed Rule 5.01 comment, “[i]n all events, a candidate for judicial office should maintain the dignity appropriate to judicial office” was deleted. “Moreover, although it is not prohibited by Rule 5.01, holding an office or a leadership position in an issue advocacy or similar organization is highly inappropriate” was eliminated. The Joint Commission decided to revert to current Code language regarding judges’ participation in political caucuses.

Members revised proposed Rule 5.01 cmt. 13 to read, “although candidates for judicial office are permitted to respond directly to false, misleading, or unfair allegations made against them during a campaign, if the allegations relate to a pending case, it is preferable for someone else to make the response.”

The Joint Commission approved a new comment stating, “[a]ll candidates for judicial office, including candidates who are currently sitting judges, are prohibited from making comments that might affect the outcome or impair the fairness of pending or impending proceedings; compare Rule 2.11(A) with Rule 5.01(A)(11). The prohibition does not extend to situations in which comments are appropriately designed to affect the outcome of a proceeding, such as argument to the court or summation to the jury by a lawyer representing a client.”

Everything after “[s]ome restrictions on the campaign speech of candidates for judicial office are indispensable to advancing the state’s compelling interest in the independence, integrity, and impartiality of the judiciary. The prohibition set out in Rule 5.01(A)(12) does not extend, however, to the announcement or statement by candidates of their own personal views on legal, political, or other issues” was deleted.

The following language will be added in a more succinct version: “The restrictions on campaign speech in these Rules do not prevent judicial candidates from running effective campaigns that provide voters with information that helps them distinguish between candidates and is relevant in making their electoral choices. Under

the Rules, judicial candidates may and should promise to faithfully and impartially perform the duties of the office by discussing specific matters relating to judicial organization, administration, and court management. For example, as long as they do not create unjustified expectations that mislead the voters, candidates may pledge to dispose of a backlog of cases, to avoid favoritism in appointments and hiring, to start court on time, to improve conditions for jurors, and to increase efficiency. Candidates may also discuss matters such as what they would do outside the courtroom to improve the justice system, how to improve public confidence in the courts, and how to implement the recommendations of racial and gender bias task forces, for example.” The phrase “unjustified expectations” will be deleted.

The Joint Commission decided to use a modified version of another comment, “[c]itizens have a due process right to expect that judges will make decisions based on the evidence, the law, and the arguments of the parties regardless of the personal views of the judge.”

Members decided not to add “[i]gnorance of the contents of statements issued by the candidate’s campaign committee will not be a defense to a complaint for violation of these Rules.”

It was suggested that proposed Rule 5.02(D), which concerns purchasing tickets for dinners or other events sponsored by a political organization or a candidate for public office, should be amended to permit attendance. Members considered whether to define “personal use” to include close family members. The provision should refer to “spouse, domestic partner, or guest.” It was decided not to insert a reasonable person test.

Members considered an objection to “on the same court for which they are running” in proposed Rule 5.02(G), which led them to discuss whether the provision was redundant with regard to partisan elections and whether to broaden the provision to allow endorsement of candidates beyond court systems. After further discussion, the Joint Commission decided to make no changes to the provision.

Regarding proposed Rule 5.02 cmt. 3, which states that “candidates are considered to be running for a position on the same court if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election,” members agreed to add language relating to judicial candidates making affirmative statements regarding their ability to cooperate with others on the bench.

A provision will be added stating that a judicial candidate shall direct the candidate’s campaign committee to divest unused campaign funds consistent with relevant laws within a 180-day time period.

Proposed Rule 2.14(A) was revised to state that “[a] judge shall require staff, court officials and others subject to the judge’s direction and control to act in a manner compatible with the judge’s obligations under this Code.”

The Joint Commission discussed the background of proposed Rule 2.17, “Reporting Judicial Misconduct,” and whether to use “shall” or “should” with regard to informing the “appropriate authority.” They also discussed the differences between “having knowledge” and “receives information” in the rule's comment. In the second sentence, “should” was changed to “shall.” It was suggested that additional comment language be added to amplify the meaning of “appropriate action.” The title of the rule was changed to “Responding to Judicial Misconduct.” It was suggested that “has committed a violation” be changed to either “allegedly has committed a violation” or “may have committed a violation.”

In proposed Rule 2.19, “appropriate action” was changed to “corrective action.”

Members generally agreed that it would be useful to include a comment under proposed Rule 2.19 regarding judicial cooperation in disciplinary proceedings. The comment, however, would not explicitly reference the applicability of privilege. Members were favorably disposed toward a shortened version of a suggested comment, “[d]uring disciplinary proceedings, including investigations, a judge, including a respondent judge, shall cooperate and be candid and honest and shall not retaliate directly or indirectly by words or conduct at any time against a complainant, courthouse employee, witness, or any person known or suspected to have assisted or cooperated with the judge.”

The Joint Commission decided that the title of proposed Rule 3.01 should be “Misusing the Prestige of Judicial Office” instead of “Using the Prestige of Judicial Office.” They agreed to add “[i]t would be improper for a judge to allude to his or her judgeship to gain favorable treatment when stopped by a police officer for a traffic offense. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.”

Members also decided to add “[t]his prohibition applies to all adjudicative proceedings including disciplinary matters and includes communication of character information through any method to a sentencing judge or a probation, parole, or corrections officer although a judge may provide to such persons other information for the record in response to a formal request.”

In response to a concern regarding judges testifying as expert witnesses, members agreed to substitute “without a subpoena” for “voluntarily” in proposed Rule 3.02 cmt. 1.

Regarding proposed 4.02, “Appearances Before Governmental Bodies,” members agreed to add, “[a] judge shall not appear voluntarily.” “Civic” and “charitable,” both of which appear in proposed Rule 4.04, will be defined terms.

Members considered whether to limit judges' appearance or attendance at any fundraising event, or limit such appearance or attendance to law-related events. After further discussion, a majority agreed that the law-related exception was permissible. Members also would allow judges to engage in fundraising for groups like the Red Cross and for law schools.

Members also agreed to delete "or an organization that has taken a public stand on issues to be litigated in a case before the court on which the judge sits." "Appear" will be substituted for "attend."

Regarding proposed new Rule 4.10 cmt. 4, which relates to a gift to a judge, or to a member of the judge's family living in the judge's household, that is "excessive" in value, members decided not to include a specific dollar amount. Reporting obligations under proposed Rule 4.15 will be "semiannually."

The comment to proposed Rule 4.04 cmt. 4 was revised to read, "[s]o long as the judge is not involved in direct personal solicitation, it is permissible for a judge to engage in insignificant, incidental, or behind-the-scenes fundraising activities on behalf of a civic or charitable organization, if the judge's name or title are not used."

The Joint Commission will have an additional teleconference to discuss Application, Scope, Preamble, and Terminology.